

January 27, 2021

Via E-mail and FedEx

David Eppler
Enforcement Officer
Assessment & Enforcement Branch, Superfund Division
United States Environmental Protection Agency
Region 6
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RE: **Response to General Notice Letter for the Goodrich Asbestos Site in Miami, Ottawa County, Oklahoma**

Dear Mr. Eppler:

This letter serves as Goodrich Corporation's (f.k.a. The B.F. Goodrich Company") ("Goodrich's") response ("Response") to the United States Environmental Protection Agency's ("U.S. EPA's") July 31, 2020 General Notice Letter for the Goodrich Asbestos Site in Miami, Ottawa County, Oklahoma (the "Site").¹ The 1000 Goodrich Boulevard, Miami, OK property ("Property") and the former tire facility ("Facility") associated with the Site have a long and detailed history, and Goodrich refers U.S. EPA to its very extensive prior responses to U.S. EPA's Information Requests for further information. *See 2019-05-15 Goodrich Response to 104(e) Request; 2019-05-28 Goodrich Supplemental Response to 104(e) Request; 2019-09-24 Goodrich Second Supplemental Response to 104(e) Request* (collectively, "Goodrich's 104(e) Responses"), attached as Exhibit A.² As set forth in those prior responses, and more fully detailed below, Goodrich has carefully considered and evaluated U.S. EPA's General Notice Letter and has concluded that neither the facts nor the law support the imposition of strict liability on Goodrich

¹ While U.S. EPA's General Notice Letter to Goodrich is dated July 31, 2020, Goodrich did not receive a copy of this letter until October 20, 2020. The General Notice Letter did not request a response, nor did it have a deadline to respond. On October 23, 2020, U.S. EPA distributed an email requesting a response to the General Notice Letter within sixty (60) days. U.S. EPA later granted Goodrich two extensions to provide a response to the General Notice Letter, and thus, this Response is timely.

² Certain exhibits attached to Goodrich's 104(e) Responses are also attached to this Response for ease of reference, as referenced throughout.

David Eppler
January 27, 2021
Page 2

for costs that U.S. EPA incurred pursuant to the Comprehensive Environmental Response and Compensation Act (“CERCLA”) in connection with the Site.

I. Absent Any Facts Demonstrating that Goodrich Caused or Contributed to a Release of Asbestos at the Site, EPA is Not Entitled to Relief from Goodrich under CERCLA

Goodrich owned the Property and Facility³ until September 16, 1993 when Goodrich donated the Property and the Facility to the nonprofit organization Save Our Children’s Environment (“SOCE”). *1993 Donation Agreement*, Bates No. GOODRICH000724 (originally attached to Goodrich’s 104(e) Responses), attached here as Exhibit B. To date, EPA has not identified any facts establishing that a release of asbestos into the environment occurred prior to that donation during the period of Goodrich’s ownership. Before divesting the Site, Goodrich undertook numerous steps designed to identify and address the presence of asbestos in equipment and structures at the Site. Those actions, detailed in Goodrich’s prior responses to EPA, included the following: (1) conducting a series of asbestos abatement activities at the Facility; (2) performing indoor air testing on asbestos; (3) hiring OSHA experts to oversee asbestos abatement activities; (4) meeting with Oklahoma State health and environmental officials to discuss asbestos abatement efforts; and (5) passing Oklahoma official inspections (from the Oklahoma Department of Labor (“ODOL”) and the Oklahoma Department of Environmental Quality (“ODEQ”). As a result of these efforts, Goodrich ultimately received an October 10, 1992 Notice of Completion from ODOL relating to the asbestos abatement activities. *See 1992-12-07 Notice of Completion of Asbestos Abatement and Abatement Preparation Inspection Forms*, Bates No. GOODRICH001046, attached here as Exhibit C; *see also 2020-09-24 Exhibit B – Updated Timeline for Second Supplemental Response (to U.S EPA’s 104(e) Information Request)*, pp. 1-3, attached here as Exhibit D (both originally attached to Goodrich’s 104(e) Responses). At the time of the donation, Goodrich provided at least 12 environmental reports to SOCE, including records outlining Goodrich’s asbestos-related activities.

In addition to the aforementioned steps, Goodrich took particular care in the SOCE donation agreement to ensure that SOCE would properly manage any remaining asbestos in the equipment and structures on-site in a responsible manner. For example, Goodrich expressly stated in Section D(1)(k) of the donation agreement that repair or removal of the remaining asbestos containing materials in equipment in structures at the Facility, which were intact at the time of transfer, would need to be managed in accordance with state and federal law. *1993-07-13 Donation Agreement*, p. 9, Exhibit B.

Further, Goodrich took reasonable steps to vet SOCE and its intended future use of the Property before closing on the donation. To the best of Goodrich’s understanding and belief, SOCE

³ Goodrich shut down the Facility in 1986.

David Eppler
January 27, 2021
Page 3

had no intent to demolish any of the buildings associated with the Facility. On the contrary, consistent with Section D(2)(c) of the donation agreement, SOCE intended to continue active manufacturing/industrial use at the site by running a tire recycling facility. *1993-07-13 Donation Agreement*, p. 10, Exhibit B; *1995-11-06 Banke Memo*, p. 1, Bates No. GOODRICH001154, attached as Exhibit E; *see also 1996-05-08 Keith A. Banke Affidavit*, ¶ 7, Bates No. GOODRICH000724, attached as Exhibit F.

Any releases of asbestos at the Site occurred after Goodrich transferred the Site in 1993. As Goodrich has learned, approximately two (2) years after Goodrich transferred the Property and the Facility, SOCE and yet another subsequent owner, Ottawa Management Company, Inc. (“Ottawa Management”) (as well as additional subsequent owners), created the situation that required U.S. EPA to respond to the Site. *See 2019-09-24 Goodrich Second Supplemental Response to 104(e) Request*, response no. 4, Exhibit A. SOCE and Ottawa Management performed asbestos abatement activities without conducting asbestos surveys, left asbestos containing materials (“ACM”) in piles throughout the Facility and outside the Facility, and were cited for several asbestos violations from ODOL and ODEQ. *Id.* Additional subsequent owners may have caused further asbestos issues or exacerbated the conditions at the Facility and/or Property created by SOCE and/or Ottawa Management, but Goodrich had no involvement in any of these activities and was not the owner or operator of the Site, the Property, or the Facility at the time of the release(s) of asbestos.⁴

Absent any evidence of wrongful conduct by Goodrich, the courts of Oklahoma have already rejected the imposition of asbestos liability on Goodrich at this Site. In a 1995 lawsuit filed by the State of Oklahoma against B.F. Goodrich, SOCE, and Ottawa Management associated with asbestos releases at the Property caused by SOCE and Ottawa Management, the District Court for Ottawa County expressly declined to award injunctive relief against Goodrich for asbestos released into the environment after it sold the Property and the Facility. *State of Oklahoma v. Michelin North America, Inc.*, Case No. CJ-95-641; *see 1996-07-17 Findings of Fact and Conclusions of Law re Temporary Injunction Hearing*, Bates No. GOODRICH000735-GOODRICH000738, attached here as Exhibit H (issuing an injunction to SOCE and Ottawa Management to remediate the asbestos at the Property but specifically denying an injunction as to Goodrich). In that decision, the Court recounted that State inspections between August and October of 1995 (after Goodrich’s ownership) revealed “demolitions . . . resulting in numerous piles of material and debris containing

⁴ Specifically, subsequent owners such as Alan Kaspar, who owned and operated the Property from approximately 2005-2015 and who, upon information and belief, conducted extensive demolition and asbestos activities on the Facility. *See 2018-10-29 Apex Distributing – Wolf Warehouse v. Alan Kaspar*, Appellate Court Judgment, Bates No. GOODRICH001600-001606, attached as Exhibit G (affirming in part and reversing in part an unjust enrichment claim and other claims by Apex against Kaspar for failing to pay for asbestos abatement materials provided by Apex at the Facility in 2014).

David Eppler
January 27, 2021
Page 4

asbestos containing materials” that posed an imminent hazard to the environment. *Id.* at GOODRICH000736-37. The Court then granted the State’s injunction against SOCE and Ottawa Management, but expressly declined to award relief against B.F. Goodrich based on the lack of evidence establishing that it owned or operated the Property or the Facility during either the creation or maintenance of the asbestos condition there. *Id.* at GOODRICH000738. Here, EPA has no basis for reaching a different conclusion, particularly where, in contrast to the broad common law and statutory claims asserted by the State in the prior litigation, CERCLA grants EPA limited jurisdiction related only to hazardous substances (like asbestos) actually released into the environment.

II. Absent Evidence of an Asbestos Release During Goodrich’s Ownership of the Site, A Federal Court Would be Unlikely to Hold Goodrich Liable for Response Costs Incurred by EPA

Federal courts that have considered whether a party like Goodrich can be liable under CERCLA for merely selling a building containing asbestos materials have rejected such an argument. *See 3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355 (9th Cir. Oct. 3, 1990) (aggregating cases) (placement of asbestos in a building structure as a building material was not sufficient to provide a right to relief under CERCLA Section 107); *Sycamore Indus. Park Associates v. Ericsson Inc.*, 546 F.3d 847 (7th Cir. Oct. 20, 2008) (seller’s action of selling a building containing asbestos did not constitute a “disposal” under CERCLA because all asbestos remaining at the property was inside the building and had not been released into the environment); *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379 (7th Cir. May 4, 1995) (a party cannot recover its response costs under CERCLA Section 107 for clean-up of asbestos installed in a commercial building); *see also First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 867-869 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), *superseded by statute on state-law grounds*, CJ § 5-108, *as recognized in Burns v. Bechtel Corp.*, 212 Md. App.237, 246 (Md. Ct. Spec. App. 2013) (dismissing the Plaintiff Church’s asbestos-related claims against a ceiling plaster manufacturer and clarifying that CERCLA is not intended to apply to recovering costs associated with removing asbestos that was part of a building structure).

The decision in *G.J. Leasing Co.*, where the Seventh Circuit found that the former owner was not liable under CERCLA for the costs the new owner paid to remediate asbestos in the decommissioned power plant it acquired and affirmed summary judgment in favor of the former owner, is instructive. 54 F.3d at 379. As part of its reasoning, the court stated, “there is no general duty to remove asbestos from a building.” *Id.* at 382. Similarly, in *3350 Stevens Creek*, the Ninth Circuit affirmed judgment in favor of the former owner of the property finding that CERCLA did

David Eppler
January 27, 2021
Page 5

not allow plaintiff to recover its asbestos removal costs from defendant for merely selling the commercial property that contained asbestos to plaintiff. 915 F. 2d at 1355.

In reaching their conclusions that CERCLA does not apply to the sale of a building containing asbestos, many of these cases rely on the Fourth Circuit's reasoning in *First United* that CERCLA cannot be so broadly interpreted as to apply to such claims:

To extend CERCLA's strict liability scheme to all past and present owners of buildings containing asbestos as well as to all persons who manufactured, transported, and installed asbestos products into buildings, would be to shift literally billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context. Certainly, if Congress had intended for CERCLA to address the monumental asbestos problem, it would have said so more directly when it passed SARA. In fact, the only mention of this problem in SARA's legislative history that either party has raised, or that this Court has found on its own, points to Congress' intent to the contrary. While CERCLA is unquestionably a far-reaching remedial statute that must be interpreted with an eye toward this nation's environmental problems, it cannot reasonably be interpreted to encompass the asbestos-removal problem. 882 F.2d at 869 (internal citations omitted)

Yet again in *3350 Stevens Creek*, the court emphasized that although asbestos is clearly a hazardous substance, "that fact is insufficient to establish that its placement as part of the structure of a building constitutes 'disposal of any hazardous substance' under CERCLA." 915 F.2d at 1360-1361. The court also observed that there was no evidence the former property owner or any of its predecessors-in-interest discarded asbestos containing materials at the building, rather those materials were just part of the building. *Id.* at 1361. Moreover, the court found it important that there was "no question that the asbestos materials . . . were built into the structure, not placed 'into or on any land or water.'" *Id.*

To further clarify that an external release into the environment during ownership is a key threshold requirement to liability under CERCLA, the *Sycamore Indus. Park Assocs.* court stated, "when there is no emission into the outside environment, but rather any hazard resulting from emission of asbestos fibers would be confined inside the building, there is no release or threatened release, and thus there can be no liability under CERCLA." 546 F.3d at 853.

Additionally, at least one district court has found that although asbestos containing materials were released into the environment, the plaintiff's failure to show that defendants "were in any way responsible" for the release(s) into the environment barred plaintiff's attempt to recover

David Eppler
January 27, 2021
Page 6

asbestos removal costs from those defendants. *Bancamerica Commercial Corp. v. Trinity Indus.*, 900 F. Supp. 1427, 1462-63 (D. Kan. 1995), *rev'd in part on other grounds*, 100 F.3d 792, 795-96 (10th Cir. 1996) (although friable asbestos-containing bricks were scattered throughout the property, plaintiff failed to show that defendants caused those releases during their operation of the facility). Based on the above, Goodrich believes that a court would be unlikely to uphold any effort by EPA to impose liability on Goodrich based on the mere presence of asbestos during its ownership.

Conclusion

While Goodrich is a former owner of the Property and the Facility, there is no evidence that Goodrich caused or contributed to a release of asbestos during the time it owned or operated the Property or Facility. On the contrary, Goodrich took affirmative steps during its ownership to prevent any harm to the environment from asbestos on-site and exercised caution in its divestiture to mitigate any risks associated with SOCE taking ownership. It is undisputed that subsequent owners of the Property and the Facility, not Goodrich, caused the releases of asbestos at issue in this matter. While U.S. EPA's interest in addressing the risks posed by asbestos is a worthy one, there is no legal basis supporting U.S. EPA's attempt to hold Goodrich liable merely because it owned and operated the Property and the Facility years before subsequent owners elected to demolish the Facility, stockpile materials, and abandon the Site. To pursue recovery from Goodrich under such facts is not only contrary to the prior decision of the District Court of Ottawa County involving this Site, but also at odds with a line of well-reasoned federal court decisions generally rejecting such a broad application of CERCLA.

In light of the foregoing, Goodrich respectfully requests that U.S. EPA withdraw its General Notice Letter for the Site as to Goodrich. If you should have any further questions, do not hesitate to reach out to me.

Very truly yours,

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Heidi B. (Goldstein) Friedman

Cc: Ms. Kristen Sherman